93

FILED
MAY 8 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 07-1109

IN THE

Supreme Court of the United States

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Petitioner,

v.

STATE OF TEXAS, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF OF FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner Kickapoo Traditional Tribe of Texas files this brief in reply to Federal Respondent's Brief in Opposition ("U.S. Br."). While the United States takes the position that the Court should deny review, its brief demonstrates that such review is warranted: it highlights the conflict among the circuits; it does not contest that the court below failed to address an issue of exceptional importance repeatedly pressed by the Tribe; and it reaffirms the Tribe's argument that the court below wrongly decided important issues of law.

The United States' Brief Highlights the Conflict Among the Circuits.

The United States asserts that the decision below does not conflict with the decisions on the same underlying issue by the Ninth and Eleventh Circuits.[1] The United States' own argument, however, demonstrates the conflict.

The United States does not quarrel with the Tribe's fundamental point that the *reasoning* of the Fifth Circuit's decision with regard to the continued availability of the Secretarial procedures remedy[2] in light of this Court's decision in *Seminole*[3] directly conflicts with the reasoning of the Ninth and Eleventh Circuits on the underlying question. This reasoning is key because it highlights the analytical framework under which the different circuits have reached conflicting results concerning the rights

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[1] *See Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998).

[2] 25 U.S.C. § 2710(d)(7)(B)(vii).

[3] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

available to tribes under the Indian Gaming Regulatory Act ("IGRA").[4] Nor does the United States quarrel with the fundamental fact that the conflicting reasoning leads to different practical results among the circuits.

The United States merely asserts that the decision below is not in conflict with the Eleventh or Ninth Circuits because neither of those circuits has "yet addressed the validity of the Procedures Regulations." (U.S. Br.7, 9.) While this narrow assertion is accurate, it is also beside the point. The result of the Eleventh Circuit decision in *Seminole* (as well as the Ninth Circuit decision in *Spokane*) is that the Secretarial procedures remedy remains available to tribes facing a state that does not consent to adjudicate the question of its good faith; the result of the decision below is that the Secretarial procedures remedy is not available to tribes in the Fifth Circuit in the same circumstances. In this fundamental respect, the law in these other circuits is in direct conflict with that of the Fifth Circuit, and review by this Court is warranted.

The Fifth Circuit Refused to Adhere to this Court's Judicial Severance Doctrine.

It is significant that the United States does not contest the validity of the Tribe's argument under this Court's severance doctrine set out in *Alaska Airlines, Inc. v. Brock*;[5] to wit, that where judicial severance of a statute would result in the statute no longer operating in the manner intended by Congress, the remaining statutory framework must

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[4] 25 U.S.C. §§2701-2721, 18 U.S.C. §§1166-1168 (1988).
[5] 480 U.S. 678 (1987).

be struck down as well. Under these familiar principles, the Tribe and the United States agree that without the continued availability of the Secretarial procedures remedy, IGRA will no longer function in the manner intended by Congress. As the Tribe demonstrates, under *Alaska Airlines*, the Fifth Circuit was required to strike down all the state participation requirements of IGRA when it invalidated the Secretary's attempt to make available the fallback procedures remedy.

The United States' sole reason for asserting that this question does not warrant certiorari is that the Fifth Circuit "did not pass on this issue below." (U.S. Br. 10.) Yet the Fifth Circuit's failure to pass on this issue is the error requiring review, since this Court's precedent required that court to undertake this analysis. In addition, this failure to apply the *Alaska Airlines* severance analysis in evaluating the Procedures Regulations directly conflicts with the core decision of the Eleventh Circuit that Secretarial procedures had to be made available to the Seminole Tribe in order to save the statute.[6]

The authority cited by the United States supports the Tribe. In *Capitol Cities Cable, Inc. v. Crisp,* this Court stated that while it does not "ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible," and found it appropriate to consider an issue that

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[6] In *Seminole*, the Tribe had argued that IGRA had to be declared unconstitutional if the judicial remedy provided by Congress to tribes could not be constitutionally applied. The Eleventh Circuit, citing *Alaska Airlines,* determined that this result could be avoided by an appropriate severance analysis that allowed the Tribe to obtain Secretarial procedures. *Seminole*, 11 F.3d at 1029.

had been, among other things, raised in petitioner's complaint and acknowledged by both the district court and court of appeals.[7] Similarly compelling circumstances are present in this case: the Tribe has consistently pressed this issue throughout this case,[8] the district court acknowledged and adopted the severance principles in its ruling,[9] and the concurring opinion below acknowledged the issue when recognizing that without the Procedures Regulations, IGRA would not function as Congress intended.[10] The Fifth Circuit's failure to pass on this issue is the fundamental flaw that puts it in direct conflict with this Court's precedent and the decision of the Eleventh Circuit in *Seminole*. It unfairly and unnecessarily leaves the Tribe with no answer to a critical question repeatedly raised that has a direct impact on its rights under IGRA.

The Fifth Circuit Erred on Exceptionally Important Issues.

The United States agrees with the Tribe that the Fifth Circuit's decision – in both its reasoning and its result – conflicts with Congress's intent in enacting IGRA, and, in particular, Congress's inclusion of the Secretarial procedures as a fallback remedy to maintain the careful compromise between

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[7] 467 U.S. 691, 697-98 (1984) (citation omitted), cited in the United States' Brief at 10.

[8] *See Kickapoo Traditional Tribe of Texas v. State of Texas Petition for Writ of Certiorari*, No. 07-1109, 2008 WL 534792, at *25 n.63 (Feb. 25, 2008).

[9] *Texas v. United States*, 362 F. Supp. 2d 765, 769-70 (W.D. Tex. 2005).

[10] *Texas v. United States*, 497 F.3d 491, 512 (5th Cir. 2007) (King, J., *concurring*).

tribes' right to offer gaming free of state regulation and states' desire for some authority in this area. The United States also does not appear to contest the Tribe's (and Amici's) description of the wide-ranging effects that will result if the decision below is allowed to stand.

The United States asserts that the "decision does not preclude the Secretary from taking future action to ensure that IGRA operates in a manner consistent with its purposes." (U.S. Br. 9.) It, however, does not explain what such future action might be or how it might be taken consistent with the decision of the court below. The fact remains that this erroneous Fifth Circuit decision voids the Secretary's attempt to make available the fallback remedy intended by Congress to ensure that IGRA operates in a manner consistent with its purposes.

On this issue of exceptional importance, the Fifth Circuit got it wrong, and its decision is in flat conflict with at least two other circuits.

The petition for certiorari should be granted.

RESPECTFULLY SUBMITTED:

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May 8, 2008

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